The express averments of wrongdoings show how the purported dismissal was brought to the court. For the reasons set out by me I was more than satisfied that there is a cause of action in this case. In view of the facts disclosed and on the line of authority relating to O 18 applications, I was more than satisfied also that this action is not frivolous or vexatious or an abuse of the process of the court. The issue of facts and law in respect of this case are matters that should be properly determined at the trial proper and this case is not an obvious and clear case for which O 18 can be applied.

In respect of the alternative ground, ie the second defendant should cease to be a party on the ground that the second defendant has been improperly or unnecessarily made a party, Mr Thomas, counsel for the plaintiff, submitted that the summons is only confined to an order to set aside the writ and the service thereof. There is no suggestion of misjoinder of parties under O 15 r 6(2)(a). Encik Hamid, counsel for the second defendant, urged the court to treat the error as an irregularity and invoke its powers under O 2. Mr Thomas submitted that the action filed against the second defendant is in his personal capacity under tort and relied on *Halsbury's Laws of England* (4th Ed) under the caption 'Action for breach of common law duties' at p 187 and the case of *Smith* v *East Elloe Rural District Council & Ors*.[6] I am of the opinion that this is not the proper case for me to exercise my discretion under O 2 and I struck out the alternative ground accordingly. As to whether there has been any tort committed by the second defendant, in my view, the matters raised by both parties in their affidavits are mainly questions of fact to be decided at the trial.

In the circumstances and for the reasons set out by me, I affirmed the earlier order that I made in chambers and, accordingly, dismissed the defendants' summons with costs.

Summons dismissed.

Solicitors: *TO Thomas & Co Advocates.*

Reported by *Azra Moiz*

Malayan United Bank Bhd v Straits Central Agencies (Sarawak) Sdn Bhd & Anor

HIGH COURT (KUCHING) — SUIT NO KG 214 OF 1988
HAIDAR J
6 JANUARY 1990

Civil Procedure — Appeal — Raising new issue — Discretion of appellate court — Technical ground — Rules of the High Court 1980, O 56 — Courts of Judicature Act 1964, ss 29 & 69

The plaintiffs appealed against the decision of the registrar dismissing their application for summary judgment against the second defendant. At the outset of the appeal, the second defendant raised a preliminary point that there had been an inordinate delay in bringing the application for summary judgment. This issue had not been taken up before the registrar.

Held, allowing the plaintiffs' appeal:

(1) A civil appeal operates by way of rehearing, and the appellate court has a discretion to allow a point of law or issue not otherwise raised at the court below to be raised on appeal. This discretion will only be exercised when the point raised relates to jurisdiction or illegality and not mere technicality.

(2) The issue of delay in the filing of the O 14 application was a procedural irregularity which could be waived under O 2 of the Rules of the High Court 1980. The second defendant had waived it by not raising the point before the registrar.

(3) It was therefore not open to the second defendant to avail himself of the irregularity on appeal.

Cases referred to

1 *Blundell* v *Rimmer* [1971] 1 All ER 1072 (refd)
2 *A-G of the Straits Settlements* v *Pang Ah Yew* [1934] MLJ 184 (refd)
3 *Central Bank of India Ltd* v *Guardian Assurance Co Ltd* [1936] MLJ 163 (refd)
4 *Hassan & Anor* v *Wan Ishak & Ors* [1961] MLJ 45 (refd)
5 *S Mariappan* v *Government of Malaysia* [1983] 2 MLJ 340 (folld)
6 *Muniandy & Anor* v *Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416 (folld)
7 *Burns* v *Devon's Iron Works Ltd* [1961] SC 102 (refd)
8 *Krakauer* v *Katz* [1954] 1 All ER 244 (folld)

Legislation referred to

Courts of Judicature Act 1964 ss 29, 69
Rules of the High Court 1980 O 2, O 56

John Lim for the plaintiffs.
Francis Ting for the second defendant.

Cur Adv Vult

Haidar J: The plaintiffs in this case appealed under O 56 r 1(1) of the Rules of the High Court 1980 ('RHC') against the decision of the senior assistant registrar dismissing the plaintiff's application (encl 22) for judgment against the second defendant under O 14 r 1 and O 18 r 19(1) of RHC.

At the outset of the hearing of the appeal, counsel for the second defendant raised a preliminary point in that

there has been an inordinate delay on the part of the plaintiff in making the O 14 application. This point was not taken up by counsel for the second defendant at the hearing of the application before the senior assistant registrar. Counsel for the plaintiff objected to the raising of such a point at the stage of the appeal before me.

The issue is — can a point not raised at the hearing before the senior assistant registrar be raised on an appeal to the judge-in-chambers pursuant to O 56 r 1(1) of the RHC?

As both counsel were not armed with the authorities when they argued on this issue, I reserved my ruling to a date to be fixed and directed them to submit written submissions with the relevant authorities within three weeks in order to assist the court to make the ruling on the issue raised.

It is not disputed that the application was filed by the plaintiffs only after the delivery of the defence and counterclaim and no explanation was given for the delay. In fact it was filed after the amended reply and defence to counterclaim (encl 20).

Mr Francis Ting, counsel for the second defendant, relied on passages from *Mallal's Supreme Court Practice* (2nd Ed) and *Halsbury's Laws of England* (4th Ed) to support his contention that he can raise the issue of delay in filing the O 14 application at the appeal stage before the judge in chambers.

Mallal's Supreme Court Practice on appeal under O 56 stated at p 680:

> The appeal is by way of rehearing and the judge treats the matter as if it has come up for hearing for the first time

37 *Halsbury's Laws of England* para 649 at p 488 stated thus:

> Fresh points may be raised before the judge which were not raised or taken before the master or registrar.

To further support his contention, Mr Francis Ting quoted the case of *Blundell* v *Rimmer*[1] where at p 1076 Payne J said:

> There is one subsidiary point. I understand that the arguments before me ranged over a wider ground than those advanced by the parties' solicitors to the district registrar, and it was contended by counsel for the plaintiff that I was fettered by the proceedings before the district registrar and confined to the arguments which were presented to him; that no point could be raised before me which was not raised below. It is, I think, clear on authority that the appeal from the district registrar is a rehearing of the application and I am entitled to treat the matter as though it comes before me for the first time; moreover, that I am not fettered by the previous exercise of the district registrar's discretion, although I should, of course, give it the weight which it deserves. Authority can be found for this proposition in the speech of Lord Atkin in *Evans* v *Bartlam* [1937] 2 All ER 646 and in the notes in the *Supreme Court Practice* 1970, under RSC O 58 rr 1 and 4.

I think the law is clear that in a civil appeal it is by way of rehearing (see ss 29 and 69(1) of Courts of Judicature Act 1964 relating to appeals to High Courts and the Supreme Court respectively). There are no lack of local authorities on this point also. It would appear that generally the appellate courts are reluctant to allow points of law or issues to be raised when they were not raised at first instance (see *A-G for the Straits Settlement* v *Pang Ah Yew*;[2] *Central Bank of India Ltd* v *Guardian Assurance Co Ltd*;[3] *Hassan & Anor* v *Wan Ishak & Ors*[4]). However, there are decided cases to show that there is a discretion in the appellate court to allow a point of law or issues not otherwise raised at the court below to be raised on appeal. From a perusal of the cases relied on by Mr John Lim, counsel for the plaintiffs, the appellate court would exercise its discretion when the point raised relates to jurisdiction or illegality and not merely technical. Abdul Hamid FJ (as he then was) in *S Mariappan* v *Government of Malaysia*[5] at p 342 said:

> In the present case the facts are not in dispute. The point raised cannot be said to be merely technical but is related to jurisdiction to be determined by reference to certain provisions of the Constitution and Service Regulations.

The Federal Court allowed the point to be argued. This aspect of jurisdiction or illegality was touched upon by Mohamed Azmi SCJ in *Muniandy & Anor* v *Muhammad Abdul Kader & Ors*[6] at p 418:

> In our view these authorities do not appear to support the appellant's application. The present case does not come under any of the established exceptions. The new point to be raised is not one of jurisdiction or illegality. It is also not a mere omission which could be categorized as falling within the realm of technicality.

As to what is a technical ground in an objection to defective pleadings, the Supreme Court in *Muniandy*'s case,[6] illustrated from the judgment of Clerk Thomson LJ in *Burns* v *Devon's Works Ltd*[7] at pp 107 to 108:

> The court is often charitable to records, and is slow to overturn on technical grounds. But when a pursuer fails completely to substantiate the only grounds of faults averred and seeks to justify his verdict on a ground which is not just a variation, modification or development of what is averred (ie pleaded), but is something which is new, separate and distinct, we are not in a realm of technicality.

It would seem clear to me that the question here is whether the inordinate delay in filing the O 14 application by the plaintiff comes under the exception of jurisdiction or illegality. In my view the objection at its best lies in the realm of procedural irregularity. On this issue of procedural irregularity, the case of *Krakauer* v *Katz*[8] may be of assistance where Lord Denning said at p 245:

> The learned judge was much influenced by a technical point. When the new solicitors, Messrs Simmons & Simmons, filed notice of change at the Central Office, they issued at the same time the summons to dismiss for want of prosecution, whereas they ought to have served a copy notice of change on the

plaintiff's solicitors before they issued the summons, because under RSC O 7 r 2(1) and (6), it is quite plain that the copy notice ought to be served before the change is effective. So there was an irregularity, but it caused no injury to anyone. It was merely a day wrong in the order of procedure. *When the summons to dismiss came before the master no point was taken on this irregularity. The matter was argued on the merits and the master dismissed the action. I am clearly of opinion that thereafter it was not open to the plaintiff's solicitors to avail themselves of this irregularity.* Order 70 r 1 shows that non-compliance with the rules does not render the proceedings void, but they can be dealt with as the court thinks fit. It is the right thing for the court to ignore that irregularity. (Emphasis added.)

As I said earlier, the issue of delay in the filing of the O 14 application is a procedural irregularity which could be waived under O 2 of the RHC and in my view, the second defendant had waived it by not raising the point before the senior assistant registrar. In other words, it is not open to the second defendant's counsel to avail himself of this procedural irregularity before me now and I rule so accordingly.

Appeal allowed.

Solicitors: *Tiong, Lim Wong & Co Advocates; Loke King & Co Advocates.*

Reported by *Mathavan Devadas*